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This is to submit comments in reference to the February 28, 2003 United States Coast Guard Notice of Proposed Rulemaking concerning Marine Casualties and Investigations; Chemical Testing Following Serious Marine Incidents.

The Drug and Alcohol Testing Industry Association (DATIA) is an 1,100-member national trade association representing the full spectrum of drug and alcohol testing service agents including laboratories, collection sites, C/TPAs, BATs, MROs, SAPs, employers, and testing device manufacturers. DATIA's mission includes working closely with key policy makers in Federal Agencies and in Congress to ensure that the interests of the industry are heard and taken into account when changes in drug and alcohol testing rules are proposed. DATIA works to ensure that these changes foster rather than hinder the industry's growth. DATIA further works to educate the industry on current standards of service and regulatory policies and procedures. In response to the Coast Guard's invitation for comment, DATIA offers the following comments on behalf of its members.

DATIA opposes the proposed rule as written for the following reasons.

#### 1. Congressional Intent

In DATIA's review of the law leading to this regulation, we found that this requirement clearly does not represent the stated intent of Congress when it passed the legislation requiring the Coast Guard post-accident alcohol testing. The basis for the Coast Guard's February 2003 NPRM concerning post-serious marine incident alcohol testing stems from the Coast Guard Authorization Act for Fiscal Years 1998 and 1999, in which Congress mandated that the Coast Guard ensure that alcohol testing occurs no later than two hours after a serious marine incident has occurred or been stabilized to prevent further damage to public safety or the environment. In the committee report, the intent was for the Coast Guard to handle the burden of this requirement as indicated by their statements. "The Coast Guard is a federal law enforcement agency and the lead marine incident response agency, and its responsibilities encompass the monitoring and enforcement of prompt compliance with federal testing rules. The Coast Guard can meet the requirements in subsection (a) by either verifying that the marine employer has conducted the tests or by conducting the tests itself. The Committee does not believe that this requirement imposes a significant burden on the Coast Guard." "...and many Coast Guard units already have such equipment." Clearly, the intent of Congress was not to impose this rule by requiring employers themselves to carry this equipment.

## **2. Device Quality Control and Unsuitability for Marine Environment**

The proposed rule will not result in accurate alcohol testing because use of Alcohol Screening Devices (ASD) are impractical without standards, and storage in the marine environment will lead to degradation in the devices. Nowhere in the regulation does it state any standards for selection of an alcohol-screening device. Currently, other DOT modes must use devices approved by the National Highway Transportation Safety Administration (agency tasked with developing model specifications for alcohol screening devices and evidential breath testing devices) to ensure that the devices are accurate. Without guidelines, and approved devices, employers will not be able to make an effective choice of screening devices.

As to their use in the marine environment, many of the alcohol screening devices are sensitive to storage temperatures and do not have unlimited shelf lives. Manufacturers warn that devices stored at too high or too low temperatures will result in false negative tests. For example, one device indicates not to store the device at temperatures above 80 degrees F. With the nature of small boats that are used most often in warm weather, employers will be hard pressed to meet the storage requirements

## **3. Collection and Test Administration Control**

The alcohol testing rule as proposed to be done by the operators themselves will fail to ensure necessary quality control and objectivity. While the Coast Guard is looking to pass their responsibility onto individual employers, the regulations do not discuss how the Coast Guard will ensure that the person administering the tests is qualified. Nor does the Coast Guard address what will happen when a captain must administer a test to him/herself. Quite often, small commercial vessels are at sea with only a captain (i.e. charters) and paying passengers. The passengers will obviously not be trained to use the device, which leaves the Captain to test him/herself. While the Coast Guard can pass their responsibility to the employer, they will be unable to ensure that the tests administered will be accurate or reported correctly. Even with a person on board to test those involved in the incident, training is needed and regular use is required to retain the training. Numerous factors can affect the results, including chewing gum, smoking, etc., that employers will be unfamiliar with.

## **4. Testing Objectivity and "Arms-length" Procedures**

The majority of vessels affected by this regulation are small vessels with a crew of less than 3 persons. Asking a crew of one or two people to objectively administer alcohol tests to themselves is a long way from "arm's length" procedures. Making them have the ASDs on board (with all of the shortcomings addressed above) effectively precludes the Coast Guard from conducting a valid test because the crew could easily manage to present a false-negative test on the ASD's. If a solitary crewmember intends to use alcohol while performing safety sensitive duties, what incentive does he/she have to make sure the ASDs are not subjected to adverse storage conditions that may render false negatives? If the goal of the new rule is to deter the use of alcohol while crewing a commercial vessel and to detect those that violate the rule by completing a valid, defensible alcohol test, the proposed procedures actually may detract from the goal by interfering with the Coast Guard's ability to conduct objective as well as valid alcohol testing.

## **5. Partial Solution is no Solution**

While highly accurate if used by trained personnel according to the manufacturer's storage and use guidelines, alcohol-screening devices are just that – screening devices. Many do not give a quantitative result – they only indicate if the person's blood alcohol content is above .02. In all other

regulations affecting other DOT modes, confirmation tests using Evidential Breath Testing (An evidential breath test device measures the alcohol content of air from a person's lungs (alveolar air) by utilizing infrared spectroscopy and/or fuel cell technology. The results are so accurate and precise that they are admissible as evidence in court.) is required following a "presumptive positive" screening test. Screening tests are not meant to provide evidence of breath alcohol content, and many things are capable of producing a false negative result, which goes back to the issue of training. Without training for and regular use by the test administrator, and without a confirmation test using a \$1,800 plus EBT device (which is impractical and highly costly for employers to do), there can be no certainty to the results obtained with just a screening device.


### Conclusion

The intent of Congress was for the Coast Guard to conduct this testing. When a serious marine incident occurs, the Coast Guard responds. The Coast Guard already has both alcohol screening devices and Evidential Breath Testing devices when it responds to marine casualties. In the Coast Guard's *Draft Regulatory Analysis for Notice of Proposed Rulemaking*, the Coast Guard states, "This proposed rule should not have an adverse effect on Coast Guard resources. All Coast Guard law enforcement platforms and most Marine Safety Offices are equipped with readily accessible breath-testing devices and have personnel capable of using the equipment for alcohol testing." Calls to numerous Marine Safety Offices confirmed this, as well as the fact that Marine Safety Offices provide comprehensive training on such devices.

If the regulation is made final as currently written, the desired result to attain correct alcohol testing results to determine if alcohol use was a cause of the serious marine incident will not be met. The devices, if used improperly or stored improperly will not provide accurate results. Such inaccuracies, though due to human error, will likely result in a decrease in the perception of alcohol testing. The backbone of the drug and alcohol testing industry is that tests are performed by trained professionals who are knowledgeable in the standards of use of the devices and who regularly use the devices.

DATIA urges the Coast Guard to revise this rule to instruct the Coast Guard to conduct post alcohol testing in marine accidents in cases where those involved are unable to be tested on land by trained professionals, which will ensure that adequately trained professionals correctly perform the tests.

Sincerely,



Laura Elaine Shelton  
Executive Director